



June 11, 1999

Ms. Linda Cloud  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR99-1643

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124793.

The Texas Lottery Commission (the "commission") received a request for the following:

- 1.) the procedures for handling formal written grievances submitted to the appropriate authorities within the Commission as called for in the Personnel Policy Handbook;
- 2.) the procedures for procuring outside services to investigate such grievances;
- 3.) the procurement of the services provided by Ms. Dedra Wilburn for the purpose of investigating a formal grievance by Jonathan L. Joseph;
- 4.) the final report on the above mentioned grievance as submitted by Ms. Dedra Wilburn;
- 5.) all handwritten notes taken by Ms. Wilburn during the course of her investigation; and
- 6.) all notes, memoranda, electronic mail, letters, or any other documents related to the grievance filed by Jonathan L. Joseph as of 10:30 am February 17, 1999.

You state that you have released many responsive documents to the requestor. You submit to this office for review responsive documents that, in whole or in part, you claim are excepted from required public disclosure by sections 552.101, 552.107, 552.111 and 552.116 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You assert that marked portions of the information may be withheld under sections 552.101 and 552.107 because of the attorney-client privilege. Although you claim that section 552.101 excepts the information from disclosure, the attorney-client privilege is properly claimed under section 552.107. Open Records Decision No. 574 at 2 (1990). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Section 552.107(1) does not apply to factual information gathered by attorneys conducting an investigation. See Open Records Decision No. 462 (1987) (attorney as fact finder). Much of the submitted information consists of factual communications from an attorney that the commission hired as an investigator. Section 552.107(1) does not protect this information from disclosure. However, the information that we have marked in Exhibit B, Exhibit C, Exhibit C-1, and Exhibit D is protected by section 552.107(1).

You also claim that the requested documents constitute work product. A governmental body may withhold attorney work product from disclosure under sections 552.103 and 552.111 of the Government Code if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You have not established that the submitted documents meet this two-pronged test. Thus, the documents are not excepted from disclosure as attorney work product.

You also assert that Section 552.111 excepts from disclosure Exhibits C and C-1, the investigative report of Employment Practices Solutions, L.L.C. and the handwritten notes of Dedra L. Wilburn respectively. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas*

*Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). The internal investigation materials at issue, including the recommendations in the investigative report, concern administrative and personnel matters of particular employees and specific personnel issues. Consequently, we do not believe that the information at issue is protected by section 552.111. *Garland v. Dallas Morning News*, No. 969 S.W.2d 548 (Tex. App.--Dallas May 13, 1998, pet. granted) (citing *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.--Houston [14th Dist.] 1996), writ denied per curiam, 41 Tex. Sup. Ct. J. 575 (1998) (documents relating to problems with specific employee do not relate to the making of new policy but merely implement existing policy)).

You argue that "Exhibit 'C-1,' in its entirety, should be excepted from required disclosure pursuant to Section 552.111 as a working document used by the investigator in drafting the final report, identified as Exhibit 'C.'" Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The preliminary draft of a policymaking document that has been released or is intended for release in a final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). The draft itself, including comments, underlining, deletions, and proofreading marks, is excepted from disclosure by section 552.111. *Id.* Purely factual matter, where severable, must generally be released. *Id.* However, when such factual matter is contained in the final version of the document, the release of the final version satisfies this requirement. *Id.* Exhibit C-1 is not a preliminary draft of a policymaking document and may not be withheld under 552.111.

You also assert that the names and identifying information on Exhibit C, the investigative report, should be excepted from disclosure under section 552.101 and the common-law right of privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987).

You also argue that the names of the witnesses or persons interviewed should be excepted from required disclosure pursuant to *Morales v. Ellen*, 840 S.W. 2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation at issue did not involve allegations of sexual harassment. Consequently, *Ellen* does not apply to protect the requested information from disclosure. We also find that the information at issue is not highly intimate or embarrassing. It is, therefore, not protected by the common-law right to privacy, and it may not be withheld under section 552.101.

Finally, you assert that Exhibit D consists of working papers and notes of the Internal auditor of the commission and are excepted from disclosure pursuant to section 552.116 of the Government Code. Section 552.116 of the Government Code excepts from disclosure

an audit working paper or draft audit report of the state auditor or of another state agency or institution of higher education as defined by Section 61.003, Education Code.

The legislation enacting section 552.116 also defines the term “audit working paper” as

all documentary and other information prepared or maintained in conducting an audit or investigation, including all intra-agency and interagency communications relating to an audit or investigation and all draft reports or portions thereof.

Act of May 29, 1997, 75<sup>th</sup> Leg., R.S., ch. 1122, § 2, 1997 Tex. Gen. Laws 4266, 4267 (amending Gov’t Code 321.001). An “audit” is defined as “1: a formal examination of an organization’s or individual’s accounts or financial situation, b: the final report of an audit 2: a methodical examination and review,” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (9<sup>th</sup> ed. 1989) and “to make an official systematic examination of (accounts), so as to ascertain accuracy,” THE OXFORD ENGLISH DICTIONARY (2<sup>nd</sup> ed. 1989). Section 321.0136 of the Government Code defines “investigation” for purposes of chapter 321 as

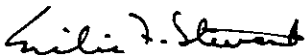
an inquiry into specified acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance.

Gov't Code § 321.0136.

We have reviewed the submitted information. We do not believe that the information constitutes "audit working paper[s]" as contemplated in Government Code section 552.116 or section 321.001. *See* Gov't Code §§ 321.0131-.016 (defining state audits and investigations); Open Records Decision No. 580 at 9-10 (1990). The requested information deals primarily with the personnel matters of the commission. Accordingly, the commission may not withhold the requested information based on section 552.116 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Emilie F. Stewart  
Assistant Attorney General  
Open Records Division

EFS\nc

Ref: ID# 124793

Encl: Submitted documents

cc: Mr. Jonathan L. Joseph  
Promotions Manager  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630  
(w/o enclosures)